A

Ravindran a/l Ramasamy v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–86 OF 2011
APANDI ALI, LINTON ALBERT AND HAMID SULTAN JJCA
12 APRIL 2013

C

Criminal Law — Arms offences — Discharging firearm in commission of robbery — Firearm discharged by accomplice during robbery committed by appellant and accomplice — No evidence of appellant attempting to prevent accomplice from using firearm or disassociating himself from accomplice — Whether appellant guilty under Firearms (Increased Penalties) Act 1971 s 3A

D

Criminal Law — Penal Code — s 34 — Common intention — Offence of discharging firearm in commission of robbery — Firearm discharged by accomplice during robbery committed by appellant and accomplice — No evidence of appellant attempting to prevent accomplice from using firearm or disassociating himself from accomplice — Whether common intention established

E

The appellant and another accomplice ('deceased') entered into a jewellery shop to rob. The appellant and the deceased had broken the glass display in the shop with a hammer and pocketed the jewellery into a bag. In that process, the deceased took out a gun from his pocket and had shot several times. There was no evidence to show that the appellant made any attempt to stop the deceased from using the firearm or disassociate himself from the deceased when the firearm was used. The appellant was charged with two offences. One under s 3A of the Firearms (Increased Penalties) Act 1971 ('Act') and the other for robbery using a deadly weapon, ie a hammer. The appellant was found guilty of both the charges and was sentenced to death. The appellant appealed against the first charge.

F

G

Held, dismissing the appeal:

H

(1) Under s 3A of the Act and s 34 of the Penal Code ('Code') which deals with common intention, one need not be the principal offender to be liable for the offence. Association in the crime and failing to show satisfactory disassociation from the crime or principal offender will attract the charge as well as the sentence (see para 4).

I

(2) For the prosecution to succeed in relation to a charge under s 3A of the Act it has to establish five essential elements of the offence, namely: (a) the said scheduled offence was committed; (b) the accused was an accomplice; (c) the accused was present at the scene of the robbery; (d)

the firearm was discharged within the meaning of s 2 of the Act; and (e) the accused may reasonably be presumed to have known that the person who discharged the firearm was carrying the same (see para 5).

(3) There was no evidence to suggest that the appellant disassociated from the act of the deceased in discharging the firearm. In fact, the evidence showed that the appellant did not leave the scene after the first gun shot by the deceased but he instead continued to pick up the jewelleries during the whole tenure of subsequent shots fired by the deceased (see para 11).

(4) There was no evidence to show on the balance of probabilities that the appellant had taken all reasonable steps to prevent the discharge of the said firearm by the deceased. Mere denial of knowledge would not per se be sufficient to satisfy the burden placed under s 3A of the Act. Mere denial also will not be sufficient to relieve the accused of the elements of s 34 of the Code (see para 12).

[Bahasa Malaysia summary

Perayu dan rakan sejenayah (si mati) memasuki kedai barang kemas untuk merompak. Perayu dan si mati telah memecahkan bekas kaca di kedai tersebut dengan penukul dan memasukkan barang kemas ke dalam beg. Dalam proses tersebut, si mati mengeluarkan pistol daripada poketnya dan menembak beberapa kali. Tidak terdapat keterangan untuk menunjukkan bahawa perayu membuat apa-apa percubaan untuk memberhentikan si mati daripada menggunakan senjata api atau memisahkan dirinya daripada si mati apabila senjata api digunakan. Perayu dituduh dengan dua kesalahan. Satu di bawah s 3A Akta Senjata Api (Penalti Lebih Berat) 1971 ('Akta') dan satu lagi untuk rompakan menggunakan senjata berbahaya, iaitu penukul. Perayu didapati bersalah terhadap kedua-dua tuduhan dan dihukum mati. Perayu merayu terhadap tuduhan pertama.

Diputuskan, menolak rayuan:

(1) Di bawah s 3A Akta dan s 34 Kanun Keseksaan ('Kanun') yang mebincangkan mengenai niat bersama, seseorang tidak perlu menjadi pesalah utama untuk bertanggungjawab bagi kesalahan. Perhubungan di dalam jenayah dan kegagalan menunjukkan pemisahan yang memuaskan daripada jenayah atau pesalah utama akan menarik tuduhan dan juga hukuman (lihat perenggan 4).

(2) Untuk pihak pendakwaan berjaya berkaitan tuduhan di bawah s 3A Akta ia mesti membuktikan lima unsur utama kesalahan, iaitu: (a) kesalahan yang dijadualkan tersebut dilakukan; (b) tertuduh adalah rakan jenayah; (c) tertuduh berada di tempat jenayah; (d) tembakan dilepaskan dalam maksud s 2 Akta; dan (e) tertuduh mungkin secara munasabah dianggap mengetahui bahawa orang yang melepaskan tembakan membawa pistol (lihat perenggan 5).

(3) Tidak terdapat keterangan untuk mencadangkan bahawa perayu memisahkan dirinya daripada tingkah laku si mati dalam melepaskan tembakan. Sebenarnya, keterangan menunjukkan bahawa perayu tidak meninggalkan tempat kejadian selepas tembakan pertama oleh si mati tetapi dia sebaliknya terus mengutip barang-barang kemas sepanjang tempoh keseluruhan tembakan-tembakan yang dilepaskan oleh si mati (lihat perenggan 11).

(4) Tidak terdapat keterangan untuk menunjukkan atas imbangan kebarangkalian bahawa perayu telah mengambil kesemua langkah-langkah munasabah untuk menghalang pelepasan tembakan tersebut oleh si mati. Penafian pengetahuan semata-mata tidak akan memenuhi untuk memuaskan beban yang diletakkan di bawah s 3A Akta. Penafian semata-mata juga tidak mencukupi untuk melepaskan tertuduh daripada unsur-unsur s 34 Kanun (lihat perenggan 12).]

Notes

For a case on discharging firearm in commision of robbery, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 42.

For cases on s 34 of the Penal Code, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2004–2028.

Cases referred to

Ashok Kumar v State of Punjab AIR 1977 SC 109, SC (refd)
Joginder Ahir v State AIR 1971 SC 1834, SC (refd)
PP v Choo Chuan Wang (unreported), HC (refd)
Suresh v State UP (2001) SCC, HC (refd)

Legislation referred to

Firearms (Increased Penalties) Act 1971 ss 2, 3A
Penal Code s 34

Appeal from: Criminal Trial No 45–12 of 2008 (High Court, Pulau Pinang)

N Sivananthan (Tina Ong with him) (Sivananthan) for the appellant.
Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] We heard the appellant's/accused's appeal on 27 February 2013 and on the same day we dismissed it. My learned brothers, Mohamed Apandi bin Hj Ali JCA and Linton Albert JCA have read the judgment and approved the

same. This is our judgment.

BRIEF FACTS

[2] The appellant and another accomplice named Jayakumar (the deceased) entered into a jewellery shop to rob on 14 January 2008. From the evidence of SP3 and SP5 it was clear that the appellant and the deceased had broken the glass display in the shop with a hammer and pocketed the jewellery into a bag. In that process, the deceased took out a gun from his pocket and had shot several times. *There was no evidence to show that the appellant made any attempt to stop the deceased from using the firearm or disassociate himself from the deceased when the firearm was used.* (Emphasis added.) After the robbery both ran out and the appellant was caught and the deceased managed to escape. Subsequently, on 27 March 2009 the deceased was shot dead by the police in a separate armed robbery operation.

[3] The appellant was charged with two offences. One under s 3A of the Firearms (Increased Penalties) Act 1971 ('FIPA 1971') the other for robbery using a deadly weapon, ie a hammer. The appellant was found guilty of both the charges. On the first charge he was sentenced to death. On the second charge he was sentenced to ten years imprisonment and ten strokes of the rotan. The appellant is not appealing on the second charge but only the first which reads as follows:

> Bahawa kamu bersama-sama seorang lagi yang telah meninggal dunia, pada 14 Januari 2008, jam lebih kurang 11.00 pagi, di Kedai Emas Gayanthrii Tangga Maligai Jewellers, No. 42, Lebuh Pasr, dalam Daerah Timur Laut, dalam Negeri Pulau Pinang, telah melepaskan tembakan yang boleh menyebabkan kematian semasa melakukan rompakan di mana kamu mengetahui rakan sejenayah tersebut ada di bawah jagaan atau kawalannya senjata api dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 3A Akta Senjatapi (Penalti Lebih Berat) 1971 yang boleh dihukum di bawah seksyen yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

[4] What is important to note, under s 3A of the FIPA 1971 and s 34 of the Penal Code which deals with common intention is that one need not be the principal offender to be liable for the offence. Association in the crime and failing to show satisfactory dis-association from the crime or principal offender will attract the charge as well as the sentence as per decided cases in this area of jurisprudence. Section 3A of the FIPA 1971 reads as follows:

> Where, with intent to cause death or hurt to any person, a firearm is discharged by any person at the time of his committing or attempting to commit or abetting the commission of a scheduled offence, each of his accomplices in respect of the offence present at the scene of the commission or attempted commission or abetment thereof who may reasonably be presumed to have known that such person was

A carrying or had in his possession or under his custody or control the firearm shall, notwithstanding that no hurt is caused by the discharge thereof, be punished with death, unless he proves that he had taken all reasonable steps to prevent the discharge.

B Section 34 of the Penal Code reads as follows:

When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

C **[5]** It is well settled that for the prosecution to succeed in relation to a charge under s 3A of the FIPA 1971 it has to establish five essential elements of the offence, namely:

(a) the said scheduled offence was committed;

D (b) the accused was an accomplice;

(c) the accused was present at the scene of the robbery;

(d) the firearm was discharged within the meaning of s 2 of the FIPA 1971; and

E (e) *the accused may reasonably be presumed* to have known that the person who discharged the firearm was carrying the same. (Emphasis added.) The burden to disprove is one on the balance of probabilities as imposed by s 3A of the FIPA 1971.

F **[6]** In *Public Prosecutor v Choo Chuan Wang*, Edgar Joseph Jr J (as he then was) had this to say:

Thus, the onus is passed to the accused to prove, on the *balance of probabilities* that
G he had taken all reasonable steps to prevent the discharge of the firearm concerned. (Emphasis added.) However, the accused's bare denial that he was a party to the robbery and his conduct at the scene of the crime could not possibly discharge the onus which lay upon him.

H **[7]** Having said that, it must be noted that s 34 does not provide such a high burden on the accused. However, there must be some evidence at the trial either at prosecution stage or defence stage to show that the accused at the time of the incident had dis-associated from the criminal act to be relieved from s 34. For example, if several persons have joined hands to assault a person by hand
I and suddenly one of the accomplice takes a knife to assault, any accomplice who attempts to stop the other from using the knife or moves away from the incident will not be charged for murder or culpable homicide in the event the knife was used to kill the victim. The only offence at all the accomplice may face is for assault (see *Joginder Ahir v State* AIR 1971 SC 1834).

[8] The difference between s 3A of the FIPA 1971 and s 34, inter alia, is that the threshold burden for the prosecution to establish the case is low and the burden to disprove the case for the accused is on the balance of probabilities (high threshold). However, when s 34 is relied on the threshold burden is high for the prosecution and burden on the defence is low, ie need not disprove on the balance of probabilities, and it will be sufficient if the defence cast a reasonable doubt. Further, the existence of a common intention among the participants in a crime is the essential element for the application of s 34 and in the absence of such common intention, the section has no application, (see *Ashok Kumar v State of Punjab* AIR 1977 SC 109). It is also well settled in relation to s 34 that at times it is difficult if not impossible to procure direct evidence to prove the intention of an individual. In most cases it has to be inferred from his act or conduct or other relevant circumstances of the case, (see *Suresh v State UP* (2001) SCC). On similar note the position under s 3A of the FIPA 1971 is not only the same but the threshold for the prosecution to satisfy this requirement is placed much lower than s 34.

[9] In the instant case, the learned judge had meticulously dealt with the elements of the offence at the prosecution stage and made a finding that the elements of the offence had been established. That part of the judgment reads as follows:

> Adalah juga sukar bagi mahkamah ini membayangkan tertuduh tidak mengetahui bahawa rakan sejenayahnya memiliki pistol ketika itu apabila menurut SP5, beliau mendengar tembakan pertama sejurus selepas tertuduh memecahkan cermin-cermin tempat pameran apabila rakan sejenayah beliau memasuki kedai emas tersebut *tanpa sesiapa mencabar atau melontarkan apa-apa peralatan ke arah mereka berdua.* Tambahan pula, selepas tembakan pertama tersebut, tertuduh bukan sahaja tidak melarikan diri atau menahan rakan sejenayahnya dan melepaskan tembakan, malah sepanjang tempoh tembakan kedua dan ketiga oleh rakan sejenayahnya (menurut SP3 terdapat 3–4 kali tembakan). Tertuduh masih terus mengutip barang-barang kemas dan memasukkan ke dalam beg yang beliau bawa dan juga sebagaimana terbukti kemudiannya, di dalam pouch bag beliau.

[10] The appellant has filed a lengthy memorandum of appeal on issues of facts and pleads that if the deceased was alive his evidence would have been corroborated ie to say that he had no knowledge the gun was carried by the accused. The learned trial judge had written a lengthy judgment and had considered the defence in extenso. It is not in dispute during the defence stage the appellant had conceded to going to the jewellery shop to rob. That part of the evidence reads as follows:

Mengenai pertuduhan kedua terhadap saya, saya mengakui bahawa pada 14.1.2007 jam lebih kurang 11.00 pagi tersebut, saya sememangnya ada pergi ke dedai emas Gayanthrii No. 42, Lebih Pasar, Pulau Pinang bersama Ramu tetapi tidak mengetahui yang Ramu mempunyai pistol dan bertujuan akan melepaskan tembakan pistol tersebut. Semasa di dalam kedai tersebut, saya tidak melihat siapa sebenarnya yang melepaskan tembakan. Saya hanya dengan bunyi tembakan dari arah belakang saya mendengar sebegitu. Saya terus berlari keluar.

[11] There is no evidence to suggest that the appellant dis-associated from the act of the deceased in discharging the firearm. In fact, evidence from PW3 shows that the appellant did not leave the scene after the first gun shot by the deceased but he instead continued to pick up the jewelleries during the whole tenure of subsequent shots fired by the deceased. That part of the evidence during cross-examination reads as follows:

Put: Apabila lelaki India lain tersebut menembak pertama kalinya, Tertuduh terus melarikan diri daripada kedai kamu.

J: Tidak, Tertuduh tidak lari semasa tembakan pertama tersebut.

Further PW3 in re-examination went on to say as follows:

… Saya hanya ingat lelaki yang menembak tersebut bercakap kepada Tertuduh yang bermakna 'kita keluar' atau 'Kilambuda' dalam Tamil yang bermaksud 'kita keluar'.

Semasa lelaki India yang menembak tersebut melepaskan tembakan pertama Tertuduh sedang mengambil barang kemas. Sejurus selepas tembakan pertama itu. Tertuduh masih iuga mengambil barang kemas daripada kaunter barang kemas saya.

[12] We have read the appeal record and the memorandum of appeal in detail. We could not find any evidence to show on the balance of probabilities that the appellant had taken all reasonable steps to prevent the discharge of the said firearm by the deceased. Mere denial of knowledge would not per se be sufficient to satisfy the burden placed under s 3A of the FIPA 1971. Mere denial also will not be sufficient to relieve the accused of the elements of s 34 of the Penal Code.

[13] In conclusion we find the appeal has no merits. The appeal is dismissed and we affirm the decision of the High Court.

[14] We hereby order so.

Appeal dismissed.

Reported by Kanesh Sundrum